U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 24May2002

Case No: 2000-STA-0053

In the Matter of

OTIS CARMICHAEL

Complainant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, INC.

Respondent

Appearances:

Phillip L. Harmon, Esq.
Worthington, Ohio
For the Complainant

Joseph C. Devine, Esq.
BAKER & HOSTETLER, LLP
Columbus, Ohio
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), as amended, 49 U.S.C. Section 31105 and the Regulations found at 29 C.F.R. Part 1978. The STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be unsafe.

Otis Carmichael filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration (hereinafter OSHA) on May 28, 1999, alleging that Respondent, Consolidated Freightways Corporation of Delaware, Inc., (hereinafter CF) discriminated against him in violation of Section 405(b) of the Act. During the

hearing on this matter, new allegations were raised with respect to section 405(a) of the Act.

Mr. Carmichael contends that he was discharged for freight delays and filing grievances. The Secretary of Labor, acting through his duly authorized agent, investigated the complaint and on July 31, 2000, determined that there was not reasonable cause to believe that the complaint of Otis Carmichael had merit. (ALJX 06) Complainant filed objections to the Secretary's findings by way of letter dated August 4, 2000, and requested a hearing before an Administrative Law Judge. (ALJX 07)

A formal hearing commenced on March 15, 2001, in Indianapolis, Indiana, where the parties were afforded full opportunity to present evidence[1] and argument. The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence has been carefully reviewed. The Pre-hearing Order provided for a Stipulation of Facts to be completed by the parties. At the hearing, both parties agreed to submit a Stipulation of Facts post-hearing but no Stipulation was tendered.

ISSUES

1. Whether CF violated Section 31105 of the Surface Transportation Assistance Act of 1982 by discharging Otis Carmichael for having engaged in protected activity;

2. Whether Otis Carmichael was discharged for delay of freight infractions resulting in the issuance of four disciplinary letters within a nine-month period;

3. Whether the taking of fatigue breaks is a protected activity where there exist no hours of service violations and no objectively verifiable evidence to support the assertion of fatigue; and

[1] In this decision, "JX" refers to Joint Exhibits, "ALJX" refers to the Administrative Law Judge Exhibits, "CX" refers to Complainant Exhibits, "RX" refers to Respondent Exhibits and "Tr." to the Transcript of the hearing.

4. Whether Otis Carmichael is entitled to reinstatement, money damages including back pay, attorney fees, and costs.

FINDINGS OF FACT

Complainant Otis Carmichael (hereinafter Carmichael or Complainant) was a truck driver for CF for twenty-four years. Carmichael was a bid driver from 1997 through most of 1998 at Respondent's Indianapolis terminal. His employment was terminated on December 2, 1998. (JX 26) Complainant notes in his brief that he received six separate discharge letters[2] in 1998. (JX 13, 18, 19, 24, 25, 26) He was discharged on July 23, 1998, allegedly due to eleven unexcused absences. (JX 13) He was again discharged on July 24, 1998, and again on August 25, 1998, allegedly for unavailability for work. (JX 18, 19) Carmichael was also discharged on May 15, 1998, May 27, 1998, and September 25, 1998, allegedly for delaying delivery of freight. (JX 24, 25, 26)

In addition to Complainant Otis Carmichael's testimony at the hearing, testimony was heard from: Larry Ping, Employer Relation Manager for Consolidated Freightways; Dale Oliver, Dispatch Operations Manager for Respondent's Indianapolis Terminal; Truck Driver and Union Steward, Gary Gregory; Charles Lee Fouts, Executive Director of the Indiana Motor Carrier Labor Relations Association; Maintenance Coordinator, Vince Pearson; and, Calvin Douglas, Assistant Dispatch Operations Manager. I found all the witnesses credible excepting for portions of the testimony of Otis Carmichael. His testimony concerning the speed capability of different model trucks was shown to be false as well as some testimony relating to the mechanical condition of his equipment. The record also establishes untruthful driver log entries as well as untruthful statements to company representatives concerning medical problems and fog conditions. In view of his untruthfulness on several matters, I choose to discount his testimony.

Testimony of Otis Carmichael

Carmichael was disciplined for delaying freight on April 23, 1998, after taking a fatigue break. He was assigned to drive from Indianapolis, Indiana to Memphis, Tennessee, arriving at 11:15 a.m. (JX 22, Tr. 715) Upon arrival, he went off-duty for twelve hours, until 11:15 p.m. *Id*. During his off-duty time, he attempted to rest at a local hotel, but was prevented from sleeping by excessive

[2] Pursuant to the National Master Freight Agreement and the Indiana Uniform Rules and Regulations, a driver is permitted to continue work during the pendency of the grievance process. (JX 02, 06)

outside noises. After his twelve hours off-duty time and after requisite inspections, he departed for Indianapolis, Indiana, via Evansville, Indiana. Carmichael testified that prior to his arrival in Evansville, he took a fatigue break from 6:15 a.m. to 8:00 a.m. Carmichael's record of duty, however, indicates that he took a fatigue break after he arrived in Evansville, from 9:45 a.m. to 11:30 a.m. Carmichael asserts that this discrepancy was an error due to his fatigued state. (Tr. 717) He attributed his fatigue to a lack of rest at the hotel, and his diabetes. Respondent disciplined Carmichael for taking nine hours and fifty minutes to travel the 297 miles between Memphis and Evansville. Based on the driving time claimed in his logs, he would have averaged thirty and three-tenths miles per hour for this trip. His log entries indicated that he traveled from Matthews, Missouri to Evansville, Indiana at a speed of approximately eighty miles per hour. Complainant denied that he drove that fast and also testified that maybe his log was also incorrect concerning entries for his lunch hour. I accord more weight to his log entries, as they were made contemporaneously with the breaks taken. Carmichael's testimony is not only inconsistent with the logs but his attempts to explain away the inconsistencies point to still more possible logging errors, and are, therefore, beyond credulity.

The second fatigue break and delay of freight discipline in issue occurred on May 1, 1998. (JX 23) On April 28, 1998, prior to leaving on a trip, he visited the company doctor who reported that his blood sugar was high. The following day, on April 29, 1998, Carmichael was dispatched from Indianapolis to St. Louis, Missouri, departing at 12:45 a.m. After three hours and fifteen minutes of driving, Complainant took a fatigue break in Effingham, Illinois from 4:00 a.m. to 6:30 a.m. He arrived in St. Louis on April 29, 1998 at 8:45 a.m. He then left St. Louis at 10:00 a.m., arriving in Indianapolis at 3:30 p.m. the same day. After a twenty-seven and one-half hour break, he was again dispatched to St. Louis on April 30, 1998, departing at 7:45 p.m., and arriving in St. Louis at 12:45 a.m. After requisite duties were performed, Carmichael left to return to Indianapolis at 2:00 a.m. After one hour of driving, he stopped for a fatigue break from 3:00 a.m. to 6:00 a.m., eventually arriving in Effingham at 7:15 a.m. He then left Effingham at 7:45 a.m., arriving in Indianapolis at 11:15 a.m. He testified that he was fatigued due to his blood sugar levels. Carmichael did not remember taking a permitted twenty-four hour slide[3], on April 29, 1998. He also testified that due to his doctors appointments, he was unable to get sufficient rest prior to the April 29 trip.

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[3] A twenty-four hour slide is an employee request for twenty-four hours off.

On May 13, 1998, Carmichael was disciplined for absenteeism on several occasions. He testified that he provided a physician's note indicating that he was suffering from constipation and bleeding hemorrhoids on May 1, 1998. He also testified that he provided a physician's note regarding cervicobranchial syndrome from October 8, 1997 to October 27, 1997. He testified that he was off November 13, 1997 through November 19, 1997, for acute shoulder pain; January 30, 1998 through February 28, 1998, for depression and alcohol treatment, April 28, 1998, for a doctor's visit; and June 2, 1998 through June 8, 1998, for an unknown illness. He suggested that his discipline for absenteeism in these instances was improper as he provided medical excuses.

Carmichael was discharged for delaying freight on May 15, 1998. On May 13, 1998, he was dispatched from Indianapolis to St. Louis, Missouri, leaving at 6:15 p.m. He arrived at St. Louis at 10:30 p.m. After requisite pre-trip inspections, he again departed for his return trip to Indianapolis at 11:45 p.m. He ate a meal in Effingham, Illinois from 2:30 a.m. to 3:30 a.m., and then arrived in Indianapolis at 6:30 a.m. He represented that he was assigned a tractor used in city driving, even though he was driving over-the-road. He testified that the truck would not go as fast, and that in his opinion, the city truck was not as powerful as the equipment he ordinarily drove. He also testified that fifty-five miles per hour was a good average speed for this trip, but that eight hours from St. Louis to Indianapolis was "too long." His testimony regarding the power, speed, and condition of the equipment is inconsistent with testimony from Vincent Pearson, Maintenance Coordinator. It is also not verified by any inspection reports from other previous or subsequent drivers.

Carmichael was again discharged for delay of freight on May 27, 1998. On May 21, 1998, he was dispatched from Indianapolis to White House, Tennessee. He left Indianapolis at 2:30 a.m., and arrived in White House at 8:30 a.m. He then left White House at 10:15 a.m. arriving in Indianapolis at 2:45 p.m., after having taken a half hour coffee break en route. When asked what a delay of freight meant to him, he testified that it was pulling over to shoot pool or any other unnecessary side trip. Carmichael testified that this trip had an estimated meet time[4] of 7:30 a.m., and that he was instructed to call if he was delayed more than an hour. He arrived at White House at 8:30 a.m., and then called Indianapolis to inform them he was beginning his return trip. Carmichael also testified that the truck he was assigned would only

[4] A "meet time" is a designated time for a driver to meet up with another driver to trade equipment.

travel at a rate of sixty-one miles per hour, and this is the reason it took longer to travel to White House.

Carmichael was discharged on September 25, 1998, again for allegedly delaying freight. On September 21, 1998, Complainant arrived in Memphis, Tennessee at 6:30 a.m. He went to a hotel, but had trouble sleeping due to airport noise. He left Memphis at 7:45 p.m., driving to Matthews, Missouri, where he stopped to eat from 10:30 p.m. to 11:30 p.m. He then drove until 12:30 a.m., taking a fatigue break in Cairo, Illinois, until 1:30 a.m. He arrived in Indianapolis at 8:00 a.m. on September 22, 1998, after taking a thirty minute coffee break en route. He testified that his fatigue was again due to high blood sugar, and a poor night's sleep in the hotel.

Complainant testified that he knew of certain instances when he refused to call dispatch, like traffic jams, which would not appear on the log. He also testified that he thought as long as he informed his destination terminal of a nap, he did not have to call. He confirmed that he had not called dispatch on the days that he received delay of freight discipline. He also acknowledged his obligation to get enough rest between runs.

Complainant also testified that he had taken a substantial number of fatigue breaks over the years, and had received no discipline. He also testified to fifteen separate fatigue breaks from April 1998, to September 1998, where he received no discipline. (RX N)

Complainant testified that Dale Oliver, the Dispatch Operations Manager, held animosity towards him. He acknowledged that he was returned to work by Mr. Oliver in March 1998, following a seventy-two hour notice, but only because he presented a doctor's excuse. He testified that it was his opinion that not returning him to work would have been an STAA violation.

Testimony of Larry Ping

Larry Ping was the Employer Relations Manager for Consolidated Freightways, with a total of thirty-three years of employment with CF. (Tr. 42) As Employer Relations Manager, Mr. Ping was responsible for the investigation of grievances filed by drivers, and ultimately representing CF in the grievance procedure. (Tr. 43) Mr. Ping was not responsible for disciplining drivers, only investigating the discipline and determining its appropriateness. He testified with respect to the National Master Freight Agreement (NMFA), local rules and regulations, and the machinery of the grievance process in general, describing the terminal level

hearings, city committees, state committees, and the joint area committees. He also confirmed the application of the collective bargaining agreements to at least nine states and thousands of employees and its binding nature on CF.

Mr. Ping testified that the grievance process requires filing grievances within ten days of a discipline letter. He further noted the policy of permitting a disciplined driver to continue working during the pendency of the grievance process.

Mr. Ping testified at length concerning the procedures for determining whether a driver was unavailable, and about the tape recording procedure when calling a driver for duty. Pursuant to CF Dispatch Rule 1B (JX 05), CF was obligated to tape attempts at calling drivers to report for duty and maintain those tapes for ninety days. CF has the burden of proof in any grievance to produce those tapes. Mr. Ping opined that CF was obligated to maintain the tapes for ninety days only, and then was permitted to destroy the tapes. He also opined that at the end of the ninety days, CF's burden of proof with respect to the tapes ended.

Mr. Ping testified that Complainant was a bid driver in 1998, allowing him to choose which runs he would drive. He noted that the CF Indianapolis Terminal had approximately forty bid drivers, and seventy to eighty extra-board drivers, which are drivers making runs turned down by bid drivers.

Mr. Ping also testified concerning the absenteeism formula contained in the Indiana Uniform Rules and Regulations. (JX 06) He testified to a four step process, beginning with a letter of information, moving on to two separate suspensions, and ending with a discharge. He stated that once the first absenteeism discharge was grieved, the employee would be returned to work by a grievance committee, giving the employee one more chance. If the employee is again absent following this process, he can be again discharged. He conceded that Mr. Carmichael had been discharged due to absenteeism (JX 13), but that the grievance committee would have reinstated him with a warning.

Complainant was also discharged on July 24, 1998, for being unavailable for duty, after receiving the three prior letters prescribed under the collective bargaining agreements. (JX 06, 15-18) Mr. Ping testified that Complainant had grieved the discharge by questioning whether calls were actually made, but that the grievance was never finally adjudicated by the various grievance committees because Mr. Carmichael was discharged on other grounds before the committees heard this grievance. It was determined to be moot and therefore not decided.

Mr. Ping testified that Mr. Carmichael was disciplined on six separate occasions for delaying freight. (CX 68, JX 22-26) The first delay of freight warning letter, issued January 7, 1998, concerned an alleged delay of freight on December 22, 1997. (CX 68) Mr. Ping testified that this warning letter was issued because Mr. Carmichael had accepted a call for duty, but called back almost two hours later and marked himself off the board. Mr. Ping conceded that this was not a delay of freight, but pointed out that since the January 7, 1998 letter was never grieved, it was still a valid warning letter, and could be used as a basis for later discharge.

Mr. Ping was questioned with respect to how a determination is made that a driver has delayed freight. He testified that no collectively bargained run times existed, but that managers and supervisors determined what constituted a reasonable time, and therefore what was a delay of freight. He further testified that run times were established for routes by making test runs with a safety supervisor, and then amending those times by considering the previous twenty-five runs for a particular route. He confirmed that these run times were not communicated to the drivers, but acknowledged that long-standing standards existed. "Delay of freight" is not a defined phrase, and in the grievance process the committees would determine whether an instance constituted a delay of freight on a case by case basis.

Mr. Ping testified that within the last five years, CF has begun to run special trucks, H-power trucks, that will perform at higher rates of speed, and utilizes those trucks in states with higher truck speed limits.

Mr. Ping had no role in deciding to issue discipline to Complainant, but rather served an investigatory role after the grievance process had begun. He also outlined the chain of command at the Indianapolis terminal, including the Division Manager, Group Operations Manager, Assistant Terminal Manager, and the Freight Operations Manager. Mr. Carmichael was an over-the-road driver, who reported to a dispatcher who reported to the Dispatch Operations Manager. Mr. Ping testified that management was responsible to train drivers on safety and driving skills, providing drivers with company manuals, Department of Transportation handbooks, NMFA safety rules, and posting safety bulletins and conducting safety meetings. With respect to driver safety, he also testified about CF's policies regarding on-duty and rest requirements. The NMFA required drivers to receive at least ten hours of off-duty time before being placed back on duty for a run. (JX 04, p.5) CF further permitted a driver to take four additional hours at his request. (JX 05, p. 4) Mr. Ping testified

that all these procedures were in place to ensure that a driver is well rested before taking a run.

If a driver experiences fatigue while on a run, Mr. Ping testified that the driver should notify the company, and then take a break. The driver is informed of his responsibility to notify the company in the event of a delay by the Transport Operators Manual, warning letters, bulletins and safety meetings. The Transport Operators Manual also provides that in situations not covered in the manual, call your supervisor for direction. (RX A, p.5)

Mr. Ping investigated Complainant's discipline for absenteeism, concluding that the discipline was warranted. He also investigated the discipline for unavailability, also concluding it was proper, and the grievance was ultimately withdrawn by the Union.

Mr. Ping investigated the April 28, 1998 warning letter for delay of freight. (JX 22) He testified that Complainant claimed that fog and a 50 mile detour slowed his trip. Mr. Ping investigated the fog claim by contacting the National Weather Service, who said that there was no fog in the area. (RX T) He also contacted other drivers on similar runs at similar times, and found the claim of fog to be unsubstantiated. He also assumed that Mr. Carmichael had taken the fifty-mile detour and yet he still concluded that Mr. Carmichael had driven too slowly, and opined that the discipline was appropriate. Mr. Ping also testified that Mr. Carmichael recorded his fatigue break after he arrived in Evansville, Indiana.

Mr. Ping investigated the May 6, 1998 warning letter for delayed freight. (JX 23) Complainant took six hours twenty-nine minutes to travel from Effingham, Illinois, to St. Louis, Missouri. Complainant asserted that he was tired due to waiting twenty-seven and one half hours for a work call. Mr. Ping's investigation revealed that Mr. Carmichael had marked himself off duty for twenty-four hours (EX Q), and had been waiting on a call for only fifty-seven minutes. Complainant also alleged eye troubles, causing him to drive slowly, but upon investigation, Mr. Ping discovered that Complainant had no proof of eye trouble, and that two days prior he had received a company physical indicating no eye problems. He also testified that subtracting out the fatigue break, Mr. Carmichael traveled too slowly, and therefore warranted the discipline given.

Mr. Ping investigated the discipline for the May 15, 1998 delay of freight. He testified that Mr. Carmichael took over thirteen hours to travel 478 miles, averaging approximately thirty

miles per hour. He compared Complainant's travel times to other drivers, even drivers on that same day, and determined that Mr. Carmichael had traveled too slowly, warranting the discipline given. There was no fatigue break taken on this trip.

Mr. Ping investigated the May 27, 1998 discipline for an alleged delay of freight. He again investigated mileage and times, and determined that Complainants average speed of thirty-nine miles per hour was insufficient and warranted discipline. He testified that his investigation revealed that a time zone discrepancy meant that Mr. Carmichael was only one hour ten minutes late for his meet time, not the two hours noted in the letter, but that his travel time was still too slow. Mr. Ping investigated Complainant's assertion that he went as fast as the truck would go. Mr. Ping pulled an equipment report indicating "61 MPH," but determined this write-up was inconsequential since the speed limit for most of the trip was sixty miles per hour. Furthermore, he testified that the Atlanta driver, a Mr. Harris, continued on to Atlanta in the allegedly defective truck, making the trip in approximately the same time as in his original truck. No fatigue break was taken on this trip, and Mr. Ping testified that he determined that the discipline was appropriate.

Finally, Mr. Ping investigated the September 25, 1998 discipline letter for an alleged delay of freight. He again determined that even absent the fatigue break, Mr. Carmichael took too long to complete the run and was therefore disciplined. He also testified that Complainant's grievance of this discipline was filed outside of the ten days permitted under the NMFA, and was therefore dismissed on a point of order by the grievance committees.

Testimony of Dale Oliver

Dale Oliver was the Dispatch Operations Manager for CF's Indianapolis Terminal at all relevant times. He is currently retired from that position.

Mr. Oliver was responsible for issuing the disciplinary letters in question in this case. He testified that at no time did the fatigue breaks enter into his decision to discipline Mr. Carmichael. With respect to the April 28, 1998 discipline, he testified that he was not aware of the existence of fatigue breaks at the time he made the decision to discipline Mr. Carmichael. He further testified that his decision could not have been related to the fatigue break as it was taken after the leg of the run for which Complainant was disciplined. He further testified that, in his opinion, Complainant just didn't want to work.

Mr. Oliver testified that he did not consider the fatigue break taken on May 1, 1998, when deciding to issue discipline to Complainant on May 6, 1998. He testified that he first learned of the fatigue break at the grievance hearing, and that even subtracting the fatigue break out, it still took Mr. Carmichael three hours to travel one hundred miles. He stated that this was too long for such a trip.

He testified that the May 15, 1998 discipline was issued for taking too long on the assigned run. As there was no fatigue break, he didn't base the decision to discipline on a fatigue break.

He also testified with respect to the discipline letter issued May 27, 1998, that Complainant delayed freight and had not called in regarding an alleged equipment problem. He testified that in delay of freight circumstances the timing of the call to dispatch is the critical issue, not the fatigue breaks taken by a driver.

With respect to the September 25, 1998 discharge, Mr. Oliver testified that he decided to discipline Complainant for unreasonable delay. He testified that the fatigue break played no part in his decision to issue discipline.

Mr. Oliver testified that he makes disciplinary decisions alone, and issues the letter through the collectively bargained processes. He hand writes the discipline letters, sends them to a union secretary for typing, and then they are issued by that secretary. He reiterated that fatigue breaks did not enter into any of his decisions to discipline Complainant. His discipline was based upon Mr. Carmichael's failure to notify dispatch with respect to freight delays and his slow travel times. He testified that based upon manuals, meetings, and warning letters, Mr. Carmichael knew that he was supposed to call in before he took breaks to prevent freight delays, and that thirty-seven miles per hour average speeds were very bad. He also testified that on two separate occasions, Mr. Carmichael was separated from the company after seventy-two hour notices[5], but Mr. Oliver reinstated Mr. Carmichael and removed discipline from his record. He testified that if he "wanted to get" Complainant, he "had him" in 1997 and 1998 after the two seventy-two hour notices, but that he brought Mr. Carmichael back to work.

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[5] Seventy-two hour notices are considered a voluntary resignation by the employee. (Tr. 491) The driver does not work pending determination of a grievance of a seventy-two hour rule, because the driver effectively quit his job. (Id.)

Testimony of Gary Gregory

Gary Gregory is an over-the-road truck driver for CF and at all relevant times was the shop union steward, investigating discipline and representing the grievant during the grievance process. Mr. Gregory testified with respect to the absentee formula contained in the Indiana Uniform Rules and Regulations, noting heightened enforcement of absentee rules since 1996. CF is permitted to hold absences against an employee for a period of nine months, after which time, discipline can not be based on an absence. He further testified that a grieved discharge letter will result in returning the driver to work for a period of time where he can have no unapproved absences. He conceded that if a discharge is not grieved, then the discharge stands and the employee does not work.

Mr. Gregory testified that Complainant had called on December 22, 1997, to mark himself off the board, due to an illness, and that he should not have been disciplined beyond removal from the board for twenty-four hours. He stated that additional discipline would not "hold up." He also testified with respect to the process of taping calls for unavailability, opining that CF retained the burden to produce tapes for a reasonable time even after the expiration of the ninety day period prescribed in Rule 1(B).

Mr. Gregory testified with respect to compounding discipline for a single act, stating that it was inappropriate. He further testified that he had seen hundreds of disciplinary letters, but had not noticed any that compounded discipline for absenteeism and unavailability, though he conceded that he had seen compound discipline for other infractions.

He testified that the July 24, 1998 discipline for unavailability was put on hold during the grievance proceedings, and that the grievance was later withdrawn after Complainant was dismissed on other grounds.

Mr. Gregory testified that he has seen CF discipline drivers for taking fatigue breaks, pointing to Ray Tyler as an example. He acknowledged that Mr. Tyler called into his dispatcher after his fatigue break. He also acknowledged that he has taken fatigue breaks and not been disciplined, and that he knows of other drivers taking naps without discipline. He testified that the President of CF issued a letter telling drivers that if they are fatigued to pull over and take a nap.

Mr. Gregory testified that he did not receive a copy of the discharge letter dated September 25, 1998. He immediately filed the grievance on Mr. Carmichael's behalf with respect to the

September 25, 1998 discipline. After corrections were made to the grievance form, the grievance was dismissed as untimely. This dismissal was ultimately upheld by the grievance process due to the untimely grievance, and Mr. Carmichael was removed from employment. He testified that he informed Mr. Oliver that they were in violation of federal law by discharging Mr. Carmichael, and Mr. Oliver advised him to go through the grievance process.

Mr. Gregory confirmed Mr. Ping and Mr. Oliver's testimony that no collectively bargained estimated times existed for runs at CF. He also opined that there was no basis for delay of freight discipline as issued in JX 22 through JX 26. He further confirmed Mr. Oliver's testimony that Complainant was returned to work in 1997 and 1998 after being deemed to have voluntarily resigned pursuant to seventy-two hour notice.

Mr. Gregory testified that he had never been a member of management at CF, and that he had never issued discipline at CF, but that a driver averaging thirty to thirty-seven miles per hour was not doing his job.

Testimony of Charles Lee Fouts

Charles Fouts is the Executive Director of the Indiana Motor Carrier Labor Relations Association (IMCLRA). In 1998, he was Executive Secretary of IMCLRA. As Executive Secretary, he scheduled grievance proceedings and operated the tape recording system at grievance proceedings. He testified that compound discipline was permissible with respect to absenteeism. He also testified that challenges to discipline beyond the ten day grievance period are impermissible.

Testimony of Vincent Pearson

Vincent Pearson was the Maintenance Coordinator for CF for twelve years. His areas of responsibility include maintenance of all city and over-the-road equipment. He testified that the city and over-the-road trucks have the same engines, transmissions, and configurations. He testified that the tractors have governors that regulate the maximum speed at which they will travel. He further testified that H-Power units have a governor set approximately three miles per hour higher than standard units, but that the "H" didn't stand for anything.

Testimony of Calvin Douglas

Calvin Douglas is the current Dispatch Operations Manager at CF's Indianapolis Terminal, replacing Mr. Oliver upon his retirement. In 1998, he was the Assistant Dispatch Operations

Manager. He testified that in 1998, he was responsible for safety meetings and ensuring safe equipment. He testified that if a driver is not called for work for sixteen hours, he is permitted another eight hours to rest before beginning work. He also testified that he issued the discharge letter to Mr. Carmichael on July 24, 1998, pursuant to the Indiana Uniform Rules and Regulations. He also testified that a fatigue break does not automatically receive a delay of freight.

CONCLUSIONS OF LAW

By way of letter dated May 28, 1999, Mr. Carmichael complained that Respondent had disciplined and ultimately discharged him, in violation of Sections 405(a) and 405(b) of the Surface Transportation Assistance Act of 1982, for taking and logging federally protected fatigue breaks. The STAA provides in relevant part, at 49 U.S.C.A. § 31105(a) that:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because -
>
> (A) the employee or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order or has testified or will testify in such a proceeding, or
>
> (B) the employee refuses to operate a vehicle because - -
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;

The regulations at 49 C.F.R. § 392.3 provide in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate . . ..

These activities, which are referred to as "protected activities," are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.

Generally, in order for a claim under the Act to proceed, a complainant must first make out a *prima facie* case showing that the employer and employee are covered under the Act, that the employee engaged in a protected activity under the Act, and that the employee was terminated or otherwise discriminated against as a result of this protected activity. *Mace v. Ona Delivery Systems, Inc.,* 9 1 STA-10 @ 3 (Sec'y Jan. 27, 1992). *Byrd v. Consolidated Motor Freight*, 97-STA-9, p.p. 4-5 (ARB May 5, 1998) Normally, the respondent then has the opportunity to rebut the *prima facie* case by showing it had a non-discriminatory reason for disciplining the complainant. *Green v. Creech Brothers Trucking,* 92-STA-4 @ 7 (Secy Dec. 9, 1992) *remanded on other grounds* (Sec'y Dec. 7, 1993). However, where the employer asserts a non-discriminatory reason for discharge during its case, the *prima facie* step can be skipped, and I may proceed directly to the next step: deciding whether the employer's reason is pretextual. *Olson v. Missoula Ready Mix,* 95-STA-21 (Sec'y Mar. 15, 1996); *Pittman v. Goggin Truck Line, Inc.,* 96-STA-25 @ n.2 (ARB Sept. 23, 1997) (citing *Carroll v. Bechtel Power Corp.,* 9 1 -ERA-46 (Sec'y Feb. 15, 1995), *affd sub nom, Carroll v. U. S. Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996)). *See also, Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999), for a general overview of the standards and burdens for claims arising under Section 405 of the Act.

In *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999), the ARB adopted the ALJ's recommended decision, but noted in regard to the ALJ's analysis of a *prima facie* case: "In a case fully tried on the merits, ... [i]t is not particularly useful to analyze whether the complainant established a prima facie case. ... Rather, the relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints." This follows the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

A refusal to drive when fatigued, in violation of 49 C.F.R. § 392.3, is protected activity under this regulation. *Polger v. Florida Stage Lines*, 94-STA-46 (Sec. Apr. 18, 1995). An employee engages in protected activity when he refuses to operate a

commercial motor vehicle under circumstances which would constitute a violation of a safety or health rule or regulation. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec. Aug. 31 1992); *Brown v. Besco Steel Supply*, 93-STA-30 (Sec. Jan. 24, 1995); *Self v. Carolina Freight Carriers, Corp.*, 91-STA-25 (Sec. Aug. 6, 1992). Refusal to work because of fatigue is protected.

Much of the record in this proceeding contains information with respect to the grievance processes available for the various disciplines given. The purpose of this proceeding relates only to discriminatory retaliation, not the appropriateness of actions either taken or not taken under the available grievance procedures.

Protected Activity

Complainant asserts that he was disciplined and ultimately discharged, in violation of §405(a)-(b), for taking and logging fatigue breaks while operating an over-the-road tractor trailer. Mr. Carmichael must show that he engaged in protected activity, that he was subjected to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. *Mace v. Ona Delivery Systems, Inc.,* 91-STA-10 (Sec'y Jan. 27, 1992). Complainant points to three instances where he took fatigue breaks and was allegedly disciplined six times for doing so.

This case was fully tried on the merits, therefore, it is not necessary for me to engage in an analysis regarding the establishment of a prima facie case. *United States Postal Service v. Aikens*, 460 U.S. 709 (1983).

Mr. Carmichael asserts that the discharges dated May 15, 1998, May 27, 1998, and September 25, 1998, based upon delays of freight are not legitimate, non-discriminatory grounds for discharge. (JX 13) These disciplinary actions are based upon six separate instances of delayed freight.

The first instance of delayed freight occurred on December 22, 1997. (CX 68) Respondent's warning letter provides that Complainant was disciplined for accepting a call for work, and then later calling Respondent to refuse the work, causing a delay of freight. (CX 68) Complainant asserts that this warning letter was not in compliance with the NMFA for various reasons. He contends that he was impermissibly disciplined twice for this event, both for unavailability and for delay of freight. He also contends that he was improperly served, and that the event was not technically a delay of freight. Again, assuming, *arguendo*, that Respondent acted in contravention of the NMFA, or any other negotiated contract

covering it's employees, such actions are properly addressed through the grievance procedures prescribed by those agreements.

Complainant further asserts that he was impermissibly disciplined due to a chronic medical condition, bleeding hemorrhoids, which prevented him from driving. Forty-nine C.F.R. § 392.3 prohibits driving under an "impairment," and the STAA prohibits discipline for refusing to drive under an impairment. As discussed in the July 12, 2001 Order, this assertion is not made alleging a violation of the STAA, but as a pattern of behavior causally linking the allegedly protected activity based upon fatigue breaks and the adverse employment action. *See, Green, supra*; *Bell, supra*. As this discipline is offered solely to establish a pattern of retaliation, and not as an independent cause of action, any allegedly protected activity in the form of unavailability due to illness addressed by this discipline is simply not before me for determination.

As no protected activity is properly associated with the discipline for the December 22, 1997 delay of freight, and this discipline was issued prior to the fatigue breaks at issue, Complainant has not satisfied his burden of proof with respect to this discipline.

Complainant also asserts that this discipline is in retaliation for reporting a violation of § 392.3, in violation of §405(a). Complainant accepted a work call, and one hour and fifty minutes later called himself in as ill. I credit Mr. Gregory's assertion that the discipline was inappropriate, but this issue is addressable to the grievance process. I find Mr. Oliver's testimony highly credible that he disciplined Complainant due to the actual delay of freight associated with this instance. Mr. Oliver testified that he returned Mr. Carmichael to work on two separate occasions in 1997 and 1998, after Mr. Carmichael had received seventy-two hour notices. Mr. Oliver stated that seventy-two hour notices were deemed by the company to be voluntary resignations. (Tr. 491) Mr. Carmichael testified that Mr. Oliver was required to return him to duty following the 1998 notice, because he had a physician's excuse for not working. The record contains no evidence that the seventy-two hour notice is disciplinary in nature, it is deemed as a voluntary resignation, therefore Mr. Oliver was not required to rescind the notice. Mr. Oliver testified that if he wanted to get rid of Complainant, he would not have returned him to work after these resignations. These reinstatements occurred, even though Mr. Carmichael alleged that he took and logged a substantial number of fatigue breaks in his twenty-four year tenure. I find the fact that Complainant was returned to work, and his record cleared of the seventy-two hour

notice, outside of the grievance process, persuasive that Mr. Oliver had no discriminatory intent in his discipline of Mr. Carmichael.

As freight was actually delayed, and CF followed the prescribed procedures for discipline, I find that Complainant has not established by a preponderance of the evidence that this discipline is consistent with a pattern of discriminatory retaliation.

Mr. Carmichael also points to other alleged patterns of discrimination by Respondent for other protected activity in an effort to show a pattern of discrimination. Mr. Carmichael asserts that the July 23, 1998 discharge for absenteeism was not a legitimate, non-discriminatory ground for discharge. (JX 13) He points out that the Indiana State Grievance Committee never considered Complainant's appeal of the absenteeism discharge letters, and that under the National Master Freight Agreement (NMFA), the discharge was unsustainable. Carmichael asserts that the July 23, 1998 discharge was in violation of various contracts binding Respondent.[6] Assuming, *arguendo*, that Respondent acted in contravention of the NMFA, or any other negotiated contract covering it's employees, such actions are properly addressed through the grievance procedures prescribed by those agreements.

The discharge letter of July 23, 1998, was premised on eleven instances of "full and/or partial absences" which were unexcused. (JX 13) Complainant testified that the June 2, 1998 to June 8, 1998 instance was actually excused, due to an illness evidenced by a physician's note. (Tr. 743; CX 41) As discussed in the July 12, 2001 Order, this assertion is not made alleging a violation of the STAA, but as a pattern of behavior causally linking the allegedly protected activity based upon fatigue breaks and the adverse employment action. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). As this discharge is offered solely to establish a pattern of retaliation, and not as an independent cause of action, any allegedly protected activity in the form of absenteeism due to illness addressed by this discipline is simply not before me for determination.

Carmichael was disciplined for absenteeism on four separate occasions. (JX 10, 11, 12, 13) The NMFA provides that excessive absenteeism is subject to discipline according to the provisions of Article 46, requiring written notices. (JX 2, pg. 4) The Official

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[6] Larry Ping testified that Respondent could not have obtained a full and final discharge based upon the absenteeism. (Tr. 96-97)

Indiana Uniform Rules and Regulations provide a four-step process for dealing with excessive absenteeism. (JX 6, pg. 4) This process was initiated on January 20, 1998, with a "Letter of Information." (JX 10) Respondent asserts that it dismissed Carmichael for "excessive absenteeism." (JX 13) Once the respondent articulates a legitimate, nondiscriminatory reason for taking the adverse action, the burden shifts back to the complainant to show by a preponderance of the evidence that the reasons were pretextual. *See Reemsnyder v. Mayflower Transit, Inc.,* 93-STA-4 (Sec'y May 19, 1994).

Carmichael's absenteeism disciplines were based upon a total of seventy-five instances of full or partial absenteeism, beginning in May 1997, and ending in July 1998. Of these instances, he offers documentation that eight instances could have been excused for a medical condition. (Tr. 743) I question these representations in view of Complainant's failure to be truthful in other instances. Regardless, I find it unlikely that Respondent used these eight absences due to a medical condition alone to discharge Complainant. The disciplinary process began before the absences due to the medical conditions, and continued through to discharge according to the NMFA. Further, it involved sixty-seven other unexcused and unexplained absences within the span of fourteen months. Employers are obviously free to discipline employees for chronic tardiness and absenteeism. *See Yellow Freight Systems, Inc. v. Reich,* 8 F.3d 980, 998 (4th Cir. 1993). Complainant has not demonstrated that Respondent's articulated reason for disciplining Carmichael's absenteeism was pretextual nor that the July 23, 1998 discharge was motivated in any way by activity that would have been protected under the STAA, had it been properly asserted. Accordingly, I find that Respondent's discharge of Carmichael for absenteeism was not motivated by any protected activity, and therefore does not establish a pattern of retaliation for activities ordinarily protected by the STAA. *Moon, supra*.

Carmichael was also discharged for unavailability. He asserts six reasons that the July 24, 1998[7] discharge for unavailability is not a legitimate, non-discriminatory ground for discharge. (CX 68) Each of these reasons relates to the grievance procedure and the availability of discharge in response to the unavailability charges. Again, assuming that each of the six reasons provided were legitimate, and Respondent acted in contravention to any negotiated contract providing protection to it's employees, such actions are properly addressed by the grievance procedures provided in those contracts.

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[7] The August 25, 1998 discharge for unavailability was rescinded by Respondent as it was improperly served on Complainant. (JX 19; Tr. 54)

Respondent articulates that it dismissed Carmichael for being "unavailable." (JX 18) The disciplinary process with respect to Carmichael's unavailability began prior to his alleged protected activity, and I find that it continued through in accordance with the NMFA to his ultimate discharge. The disciplinary letters of record refer to six instances of unavailability over a six month period. (JX 15, 16, 17, 18, 19) Carmichael has not provided evidence that these instances of unavailability were for any protected activity. Complainant has not demonstrated that discharge for unavailability is a pretext for discharging Complainant in contravention to the STAA. Accordingly, I find that Respondent's discharge of Carmichael for unavailability was not motivated by any protected activity, and therefore does not establish a pattern of retaliation.

The first fatigue break at issue was taken on April 23, 1998. He asserts that the April 23, 1998 fatigue break constituted protected activity. *Polger, supra.* Respondent articulates that Carmichael was not disciplined for taking a fatigue break, but for not notifying the dispatcher of his break, and a delay of freight based upon his late arrival in Evansville, Indiana, on April 24, 1998. (JX 22) Complainant contends that his late arrival was due to his fatigue break, which he alleges was taken at 6:15 a.m., and therefore the discipline was for taking a fatigue break, making the delay of freight discipline pretextual. Complainant bears the burden of demonstrating by a preponderance of the evidence that the proffered reason is pretextual and that he was discriminated against by Respondent. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Carmichael admits the underlying facts with respect to the delay of freight discipline issued by Respondent. He admits that he failed to call dispatch regarding the fatigue breaks in question, and that it took nine hours and fifty minutes to travel 297 miles. Dale Oliver testified that estimated times of arrival were established, but not communicated to drivers for routes and that drivers who significantly deviated from those times were disciplined. (Tr. 433) Due to the nature of the industry, insignificant deviations received no discipline. *Id*. Furthermore, Mr. Oliver testified that he was unaware of Carmichael's fatigue breaks at the time that he made the decision to issue the discipline letter. (Tr. 384)

Carmichael was assigned to drive from Indianapolis, Indiana to Memphis, Tennessee. (JX 22, Tr. 715) During his off-duty time, he tried to rest at a local hotel, but he alleges that he was prevented from sleeping by excessive outside noises. On his return

trip he departed for Indianapolis, Indiana, via Evansville, Indiana. Carmichael testified that prior to his arrival in Evansville, he took a fatigue break from 6:15 a.m. to 8:00 a.m. The log, however, memorializes this break as having occurred at 10:00 a.m., after his arrival in Evansville. Complainant explains this discrepancy as a "mistake" in logging his hours. When confronted with the impossibility of taking the fatigue break *and* making it to Evansville at the time he did, Carmichael testified that he "might" have made a further mistake in documenting a lunch period as well, logging the break as longer than he actually took. (Tr. 913) I accord more weight to the log book as an accurate chronicle of Mr. Carmichael's run, and less weight to Complainant's inconsistent testimony. Accordingly, I find that Complainant's April 24, 1998 fatigue break was taken as memorialized in his log. Therefore, the discipline for April 24, 1998 delay of freight discipline could not have been related to a fatigue break taken after arriving in Evansville.

Furthermore, Complainant took and logged fifteen fatigue breaks between April and September of 1998 with no disciplinary action taken. Still further, Respondent provides evidence of fourteen other employees taking fatigue breaks without disciplinary action, and of seven employees with delays of freight receiving the same penalties prescribed under the collective bargaining agreements with no fatigue breaks. (RX O) Similarly situated employees subjected to similar disciplinary proceedings suggests that Carmichael's discipline was not retaliatory. *Moon, supra.* Carmichael acknowledged that he took and logged a "substantial number" of fatigue breaks during his twenty-four year employment with Respondent with no disciplinary action taken. (Tr. 822) Accordingly, Carmichael has not established by a preponderance of the evidence that the April 28, 1998 discipline for delay of freight was motivated by his fatigue break.

The second fatigue break occurred on May 1, 1998. (JX 23) Carmichael asserts that he was disciplined for this break in contravention to the STAA. Respondent asserts that even without considering the fatigue break, Carmichael averaged approximately thirty miles per hour on this route and that Complainant failed to call to notify the dispatcher that he would arrive late. Complainant testified that his high sugar levels caused his fatigue, and that even though he was off duty for more than twenty-seven hours prior to this run, he couldn't rest. These facts do not demonstrate that Respondent's articulated reason for discharging Carmichael are pretextual. Mr. Ping testified that even subtracting out the time it took for Carmichael's fatigue break, he would still have been disciplined for averaging less than thirty miles per hour, which is too slow for a professional driver.

(Tr. 240) Messrs. Ping, Oliver, and Gregory agree that averaging thirty miles per hour is unreasonable. (Tr. 258, 486, 643) Complainant has not demonstrated by a preponderance of the evidence that he would not have been disciplined for the excess time taken on this run, nor that he was disciplined for taking a fatigue break.

Complainant again argues that as no estimated times of arrival were disclosed for these routes, there can be no discipline for not meeting these times. As discussed above, Mr. Oliver regularly disciplined drivers for significantly exceeding reasonable travel times. Mr. Gregory confirms that thirty miles per hour is not a reasonable average for a professional driver. (Tr. 643)

Carmichael was disciplined on May 15, 1998, for a delay of freight occurring on May 13, 1998. (JX 24) There was no fatigue break taken during this run. Carmichael asserts that this discipline is in retaliation for taking and logging the fatigue break on May 1, 1998. Respondent again asserts that this discipline is appropriately given in response to delayed freight caused by Carmichael's late arrival time. Carmichael points to the fact that he was late due to being issued a city tractor for this over-the-road run, and the city tractor would only travel at approximately 55 miles per hour. On his equipment inspection report following the trip to Indianapolis, Carmichael noted no problems with the tractor. (RX N) Vince Pearson, maintenance coordinator for Respondent, testified that the tractor driven by Carmichael on May 13, 1998, had the same transmission and engine as every other truck used by Respondent. (Tr. 951) I find Mr. Pearson's testimony with respect to the equipment driven by Carmichael more persuasive, as he is a maintenance coordinator for the equipment.

Even assuming that Carmichael's tractor was running slow, at a maximum speed of fifty-five miles per hour, this does not demonstrate pretext. Respondent disciplined Complainant for averaging less than thirty miles per hour. Mr. Ping testified that thirty miles per hour is an unacceptable rate of travel for a professional driver. (Tr. 258) Mr. Gregory and Mr. Oliver confirmed this fact. (Tr. 486, 643) I find that Complainant was disciplined for slow travel times and the resulting freight delays. Complainant has not demonstrated by a preponderance of the evidence that this discipline was motivated by discriminatory intent.

Carmichael was discharged on May 27, 1998, for delayed freight. Again, this discipline involves no fatigue breaks, but Complainant asserts that he was disciplined in violation of § 405(a), in retaliation for logging previous fatigue breaks, and grieving discipline. Respondent articulates that it disciplined

Complainant for a failure to call CF when he didn't arrive at his scheduled meet location at the appointed time.

Again, Dale Oliver issued this discipline. He testified that he disciplined Complainant for arriving late at his destination with no phone call regarding problems. This discipline was also investigated by Larry Ping, who determined that due to time discrepancies, Complainant was one hour and ten minutes late, rather than the two hours alleged in the discipline. Mr. Ping, however, determined that the discipline was still warranted as Mr. Carmichael was still more than an hour late without a phone call, and that he averaged thirty-nine miles per hour. Mr. Ping investigated Complainants allegations of equipment problems by checking equipment writeups from prior and subsequent drivers. He found no problems. As discussed above, Messrs. Gregory, Oliver, and Ping all opined that average speeds in the thirty to forty mile per hour range were unacceptable. I place substantial weight on Mr. Ping's investigation, as his investigation revealed information in Complainant's favor, but he still deemed the discipline warranted due to unreasonable travel times. Carmichael has not demonstrated by a preponderance of the evidence that this discipline was motivated by discriminatory intent.

Carmichael was discharged on September 25, 1998, for delayed freight. He again had an average speed of approximately thirty-seven miles per hour in this run. Mr. Oliver testified that he did not discipline Carmichael for being fatigued, but for failing to call with respect to his nap. Mr. Ping investigated this discipline and determined that it was appropriate considering Mr. Carmichael's travel time. For reasons mentioned above, I again place great weight on Mr. Oliver and Mr. Ping's testimony, and find no discriminatory intent in this discipline. Carmichael has failed to demonstrate by a preponderance of the evidence that this discipline was administered in retaliation for taking fatigue breaks. This final discipline was not timely grieved by Carmichael, and his late grievance was ultimately dismissed, and his discharge made final.

Conclusion

It is my belief that Complainant is attempting to circumvent the processes contained in the NMFA, and other contractual provisions, by re-litigating these claims under the rubric of STAA violations since his discharge became final due to the untimely grievance. Carmichael's discipline followed the guidelines provided by the collectively bargained for agreements. He claims discriminatory discipline by managers of CF, and yet acknowledges

that these same managers returned him to work several times following his voluntary resignations. Even after repeated warnings and disciplines, Carmichael did not perform his job to the expectations of CF, and was ultimately discharged. He was not disciplined, discriminated against or discharged for any protected activities. Complainant has failed to demonstrate by a preponderance of the evidence, a pattern of retaliation by CF, or discriminatory retaliation for taking and logging fatigue breaks. He was disciplined because it was warranted.

RECOMMENDED ORDER

In view of the above findings, I recommend that Complainant, Otis J. Carmichael's claim for reinstatement, back pay, and attorney fees be DENIED.

A
Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210.